

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION 28A

COMMISSIONERS

JEFF HATCH-MILLER, Chairman  
WILLIAM A. MUNDELL  
MIKE GLEASON  
KRISTIN K. MAYES  
BARRY WONG

Arizona Corporation Commission

DOCKETED

DEC 27 2006

DOCKETED BY	
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In the matter of:

Reserve Oil & Gas, Inc., a Nevada  
Corporation  
3507 North Central Avenue, Suite 503  
Phoenix, Arizona 85012

Allen and Jane Doe Stout, Sr. husband and  
wife  
1309 West Portland Street  
Phoenix, Arizona 85007-2102

Allen and Jane Doe Stout, Jr., husband and  
wife  
1309 West Portland Street  
Phoenix, Arizona 85007-2102

Respondents.

Docket No. S-20437A-05-0925

**THE SECURITIES DIVISION'S REPLY  
TO:  
RESPONDENT ALLEN C. STOUT'S  
RESPONSE TO THE SECURITIES  
DIVISION'S MOTION TO DEPOSE  
ALLEN C. STOUT AND MOTION FOR  
PROTECTIVE ORDER**

AZ CORP COMMISSION  
DOCUMENT CONTROL

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The Securities Division ("Division") of the Arizona Corporation Commission hereby  
replies to Respondent Allen C. Stout's Response to the Securities Division's Motion to Depose  
Allen C. Stout and Motion for Protective Order ("Response"). The Division requests the court  
order the deposition of Allen C. Stout ("Stout Sr."), or alternatively that the court order Stout Sr. to  
appear to testify at any hearing scheduled in the future. The Division also asks Respondent's  
Motion for a protective order be denied. In support of its requests, the Division files the following  
Memorandum of Points and Authorities.

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....

**MEMORANDUM OF POINTS AND AUTHORITIES****I. Undisputed Facts**

Stout Sr. clearly was absent from the scheduled hearing. The Division was unaware Stout Sr. would be absent from the hearing until that day. Additionally, there is no dispute that Stout Sr. filed a response to these proceedings, that he requested a hearing, and that he is subject to the jurisdiction of this tribunal.

**II. Law**

The Arizona administrative code gives this court the authority to order the deposition of Stout Sr. *See* A.R.S. § 41-1062(A)(4). The statute provides that if the witness cannot be subpoenaed *or* is unable to attend, the hearing officer may permit a deposition for use as evidence. The hearing officer may also permit a discovery deposition if a party demonstrates a reasonable need of the deposition testimony. *Id.* The granting of a deposition is clearly within the hearing officer's discretion, and it is not a right. However, in this case the Division believes that the hearing officer should exercise its discretion and grant the deposition

**III. Analysis**

The first basis for granting a deposition is one in which there is need for testimony and the witness cannot be subpoenaed *or* is unable to attend. This court may order Stout Sr. to appear to testify at the hearing as he is within this court's jurisdiction. Alternatively, if Stout Sr. is unavailable to attend, the court can order his deposition for use as evidence at the hearing. Based upon Stout's Sr.'s absence at the hearing and there being no representation affirmatively setting forth that he will attend any future hearing, this court may assume he cannot attend and order his deposition for evidence at the hearing.

The court may also order the deposition because the Division has shown reasonable need for the testimony. As explained in the Division's motion, a deposition may provide testimony concerning the allegations, or if the witness asserts the privilege against self-incrimination at the deposition, a prejudicial inference may be drawn from the response. *See, Fross v. Wotton*, 3 Cal.

1 2d 384, 44 P.2d 350 (1935).

2 For these reasons, the Division respectfully requests its motion be granted or alternatively  
3 that Stout Sr. be ordered to attend to testify at any hearing scheduled in the future.

4 **IV. The Division's Response to Respondent's Motion for a Protective Order**

5 **A. No Facts Support a Request for a Protective Order**

6 There are no facts that support the conclusion assumed by Respondent that the deposition  
7 sought of Stout, Sr. is to cause "annoyance, embarrassment, oppression, or undue burden or  
8 expense." According to Respondent's Response, the request resulted from the ruling to continue  
9 the case. While the Division's request came after the ruling, it also came after it was clear that  
10 Respondent Stout Sr. did not attend the hearing and would apparently not be attending any  
11 hearing. Even if the request resulted from the continuance, it is unclear how the request is made  
12 to annoy, embarrass or oppress the Respondent. The Division simply wants to proceed with its  
13 case with the testimony of Stout Sr., either in person or through deposition testimony. There is  
14 no evidence of any bad motive in making this request and injecting this baseless allegation into  
15 the equation does not respond to the law that has been cited in favor of the deposition.

16 **B. No Legal Basis is Cited in Support of the Request for a Protective Order**

17 The Respondent cites three cases, which have been attached for the judge's review. Not  
18 one of these cases factually or legally supports the Respondent's position. In *State ex. Rel.*  
19 *Chaney v. Franklin*, 941 S.W.2d 790 (1997), a Missouri prosecutor sought to depose the public  
20 defender of a witness in a criminal proceeding. The case does not stand for the proposition that  
21 the Administrative law Judge has the authority to issue a protective order as stated by  
22 Respondent. In the case of *Crandall v. Ford Motor Co.*, 260 A.D. 380 (1940), a court limited the  
23 questioning at a deposition because there was a bifurcation between liability and damages in a  
24 civil proceeding – not an administrative case. The court permitted a deposition but required that  
25 liability be found before questioning into damages would proceed. Although undersigned  
26 counsel would concede that depositions are not to be used to harass opponents, the *Crandall* case

1 cited for this proposition has no resemblance factually or legally to the one before this court.

2 There simply is no evidence to support Respondent's request for a protective order.

3 Finally, Respondent cites a Supreme Court of Louisiana case - *MTU of North America,*  
4 *Inc. v. Raven Marine, Inc.*, 475 So.2d 1063 for the proposition that depositions are to be used to  
5 gain information and prevent surprise at trial and not to harass opponents. Interestingly, in *MTU*  
6 the court did not grant a protective order and said specifically, in interpreting a Louisiana statute,  
7 that good cause had to be shown for a protective order and placed the burden on the party  
8 requesting the relief to show adequate reason for the relief. *Id.* at 1069. Here Respondent has  
9 not cited any applicable rule or statute for the protective order it requests, nor does he cite any  
10 factual basis for such relief. Instead, Respondent rests his request on conclusory statements.  
11 Wherefore Respondent's request for a protective order must be denied.

12  
13 **IV. CONCLUSION**

14 Stout Sr. filed a response to these proceedings, requested a hearing before this tribunal,  
15 and has submitted to the jurisdiction of this court. Stout Sr. cannot participate in this forum  
16 without subjecting himself to being subpoenaed for testimony. This court should either require  
17 Stout Sr. to appear at any hearing it schedules or provide the Division with a deposition for his  
18 testimony. Further, Respondent has not provided any factual or legal basis for his request for a  
19 protective order. His attempts to impute some improper reason for the Division's request is  
20 misplaced, this matter should be decided upon the law and not invective.

21 RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of December, 2006.

22  
23  
24 By



Shoshana O. Epstein  
Staff Attorney, Arizona Corporation  
Commission - Securities Division

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
2 filed this 27<sup>th</sup> day of December, 2006, with

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington  
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered along with copies of  
8 The cases cited by Respondents this  
9 27<sup>th</sup> day of December, 2006, to:

10 ALJ Marc Stern  
11 Arizona Corporation Commission/Hearing Division  
12 1200 West Washington  
13 Phoenix, AZ 85007

14 COPY of the foregoing ~~faxed~~/mailed  
15 this 27<sup>th</sup> day of December, 2006 to:

16 Paul J. Roshka, Jr., Esq.  
17 ROSHKA, DEWULF & PATTEN, P.L.C.  
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19 Phoenix, Arizona 85004  
20 Attorneys for Respondents

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